

JASON SMITH,
Plaintiff,

v.

M. DAGUIO, et al.,
Defendant

Case No. 18-06378 BLF (PR)

ORDER OF DISMISSAL WITH LEAVE TO AMEND

Plaintiff, a pretrial detainee at the Santa Rita County Jail, filed the instant pro se civil rights action pursuant to 42 U.S.C. § 1983 against prison officers at the Correctional Training Facility (“CTF”) in Soledad. (Docket No. 1, hereinafter “Compl.”) Plaintiff’s motion for leave to proceed *in forma pauperis* will be addressed in a separate order.

DISCUSSION

A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim

1 upon which relief may be granted or seek monetary relief from a defendant who is immune
2 from such relief. *See id.* § 1915A(b)(1),(2). Pro se pleadings must, however, be liberally
3 construed. *See Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988).

4 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
5 elements: (1) that a right secured by the Constitution or laws of the United States was
6 violated, and (2) that the alleged violation was committed by a person acting under the
7 color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

8 **B. Plaintiff’s Claims**

9 Plaintiff claims that on January 23, 2018, he was denied access to the library by
10 Defendant Correctional Officer M. Dagacio. (Compl. at 6, original pagination.) Plaintiff
11 complained about the incident to Defendant Dagacio’s supervisor, Sgt. Rendon, not a party
12 to this action. (*Id.*) On January 25, 2018, Plaintiff asked Defendant Dagacio for a
13 temporary pass to access the law library, at which time he also informed Defendant Dagacio
14 that he intended to file an administrative grievance against him for denying him access to
15 the law library on January 23, 2018. (*Id.*) Plaintiff claims that in response, Defendant
16 Dagacio threatened that he would either have Plaintiff moved out of the “Wing” or assign a
17 cell-mate to Plaintiff. (*Id.*) Later that same day, Defendant R. Avalos informed Plaintiff
18 that he was being assigned a cell-mate, and that any objections would result in a Rules
19 Violation Report (“RVR”) being issued per Defendant Dagacio, which Defendant Avalos
20 would fully support. (*Id.* at 7.) After speaking with the inmate, Plaintiff informed
21 Defendant Avalos that they were not compatible and that there was “a significant risk to
22 the physical safety of Plaintiff and possibility to staff” because the cell-mate was in
23 possession of “dangerous contraband.” (*Id.*) The next day, on January 26, 2018, Plaintiff
24 received an RVR for refusing to house with the inmate. (*Id.*) On January 28, 2018,
25 Plaintiff sent a request for clarification regarding “CDCR’s policies involving inmate
26 housing assignments compatibility factor” to the supervising Sgt., Defendant C. Peaden,
27 who failed to provide any response. (*Id.* at 8.) When Plaintiff appeared before Defendant

1 B. Greer, the senior hearing officer, for the disciplinary hearing on the RVR on January 31,
2 2018, he was found guilty and assessed “numerous loss of privileges.” (*Id.* at 9.) Plaintiff
3 claims that his right to due process was violated at this hearing because he was denied his
4 right to call a witness. (*Id.*)

5 Based on the above allegations, Plaintiff claims denial of access to the courts, denial
6 of access to the law library, retaliation, and violation of due process and equal protection.
7 (*Id.* at 5.) Plaintiff also claims an Eighth Amendment violation and conspiracy. (*Id.* at
8 10.) Plaintiff seeks damages. (*Id.* at 3.)

9 **1. Access to the Courts**

10 Prisoners have a constitutional right of access to the courts. *See Lewis v. Casey*,
11 518 U.S. 343, 350 (1996); *Bounds v. Smith*, 430 U.S. 817, 821 (1977). To establish a
12 claim for any violation of the right of access to the courts, the prisoner must prove that
13 there was an inadequacy in the prison’s legal access program (e.g., law library or legal
14 assistance) that caused him an actual injury. *See Lewis*, 518 U.S. at 349-51. To prove an
15 actual injury, the prisoner must show that the inadequacy in the prison’s program hindered
16 his efforts to pursue a non-frivolous claim concerning his conviction or conditions of
17 confinement. *See id.* at 351, 354-55.

18 Plaintiff’s allegations are insufficient to state a denial of access to the courts claim
19 because he has failed to allege actual injury. Even assuming that the denial of law library
20 access on January 25, 2018, amounts to an inadequacy in the legal access program, he
21 must still demonstrate that the alleged shortcomings in the program caused him an actual
22 injury by hindering his efforts to pursue a legal claim. *Lewis*, 518 U.S. at 351.¹ It is
23 “actual prejudice with respect to contemplated or existing litigation, such as the inability to

24
25 ¹ Examples of impermissible hindrances include: a prisoner whose complaint was
26 dismissed for failure to satisfy some technical requirement which, because of deficiencies
27 in the prison’s legal assistance facilities, he could not have known; and a prisoner who had
“suffered arguably actionable harm” that he wished to bring to the attention of the court,
but was so stymied by the inadequacies of the library that he was unable even to file a
complaint. *Id.*

1 meet a filing deadline or to present a claim.” *Id.* at 348. Here, Plaintiff has failed to
2 describe what non-frivolous claim concerning his conviction or conditions of confinement
3 he was hindered from pursuing. *See Lewis*, 518 U.S. at 351, 354-55. Plaintiff shall be
4 afforded one opportunity to file an amended complaint to attempt to allege sufficient facts
5 to state a cognizable denial of access to the courts claim.

6 **2. Access to the Library**

7 Plaintiff claims that Defendant Daguio denied him access to the library one time, on
8 January 25, 2018. *See supra* at 2. This one time denial of access to the law library claim
9 does not present a cognizable claim. The Constitution does not guarantee a prisoner
10 unlimited access to the law library. Prison officials of necessity must regulate the time,
11 manner and place in which library facilities are used. *See Lindquist v. Idaho State Bd. of*
12 *Corrections*, 776 F.2d 851, 858 (9th Cir. 1985). The fact that a prisoner must wait for a
13 turn to use the library does not necessarily mean that he has been denied meaningful access
14 to the courts. *See id.; Myron v. Terhune*, 457 F. 3d 996, 1000-01 (9th Cir. 2006)
15 (California state regulation governing prison law library, pursuant to Cal. Admin. Code
16 Title 15 § 3120, does not create a due process liberty interest in law library access hours).
17 Accordingly, this claim is DENIED with prejudice for failure to state a claim for relief.

18 **3. Retaliation**

19 “Within the prison context, a viable claim of First Amendment retaliation entails
20 five basic elements: (1) An assertion that a state actor took some adverse action against an
21 inmate (2) because of (3) that prisoner’s protected conduct, and that such action (4) chilled
22 the inmate’s exercise of his First Amendment rights, and (5) the action did not reasonably
23 advance a legitimate correctional goal.” *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th
24 Cir. 2005) (footnote omitted).

25 Plaintiff claims that Defendant Daguio took adverse action against him, i.e.,
26 assigned him a cellmate, because Plaintiff threatened to file an administrative grievance
27 against him, which is protected conduct. However, Plaintiff’s allegations are insufficient

1 to state a retaliation claim because he does not allege that he was actually chilled from
2 exercising his First Amendment rights. A prisoner must at least allege that he suffered
3 harm, since harm that is more than minimal will almost always have a chilling effect.
4 *Rhodes*, 408 F.3d at 567-68 n.11; *see Gomez v. Vernon*, 255 F.3d 1118, 1127-28 (9th Cir.
5 2001) (prisoner alleged injury by claiming he had to quit his law library job in the face of
6 repeated threats by defendants to transfer him because of his complaints about the
7 administration of the library); *Resnick v. Hayes*, 213 F.3d 443, 449 (9th Cir. 2000)
8 (holding that a retaliation claim is not actionable unless there is an allegation of harm).
9 Plaintiff shall be afforded one opportunity to file an amended complaint to attempt to
10 allege sufficient facts to state a cognizable retaliation claim.

11 **4. Due Process**

12 Plaintiff's allegation that he was denied his right to call witnesses during the
13 disciplinary proceeding before Defendant Greer may be an attempt to state a violation of
14 his procedural due process rights under *Wolff v. McDonnell*, 418 U.S. 539 (1974).
15 However, allegations by a prisoner that he was denied due process in conjunction with a
16 disciplinary proceeding do not present a constitutionally cognizable claim unless the
17 deprivation suffered is one of "real substance" as defined in *Sandin v. Conner*, 515 U.S.
18 472, 484 (1995). "Real substance" will generally be limited to freedom from (1) restraint
19 that imposes "atypical and significant hardship on the inmate in relation to the ordinary
20 incidents of prison life," *id.* at 484, or (2) state action that "will inevitably affect the
21 duration of [a] sentence," *id.* at 487. Here, Plaintiff claims that the guilty finding resulted
22 in "numerous loss of privileges," but makes no allegation that this loss of privileges
23 amounts to a deprivation of "real substance" under *Sandin*. (Compl. at 9.) Plaintiff shall
24 be afforded one opportunity to file an amended complaint to attempt to allege sufficient
25 facts to state a cognizable due process claim.

26 **5. Equal Protection**

27 Plaintiff mentions that his rights under the Equal Protection Clause was violated,

1 but makes no allegations supporting such a claim. (Compl. at 5.)

2 When challenging his treatment with regard to other prisoners, courts have held that
3 in order to present an equal protection claim a prisoner must allege that his treatment is
4 invidiously dissimilar to that received by other inmates. *More v. Farrier*, 984 F.2d 269,
5 271-72 (8th Cir. 1993) (absent evidence of invidious discrimination, federal courts should
6 defer to judgment of prison officials); *Timm v. Gunter*, 917 F.2d 1093, 1099 (8th Cir.
7 1990) (same). The first step in determining whether the inmate's equal protection rights
8 were violated is to identify the relevant class of prisoners to which he belongs. *Furnace v.*
9 *Sullivan*, 705 F.3d 1021, 1030 (9th Cir. 2013). The class must be comprised of similarly
10 situated persons so that the factor motivating the alleged discrimination can be identified.
11 *Id.* at 1031 (affirming district court's grant of defendants' motion for summary judgment
12 because inmate failed to raise triable issue of fact that he was treated differently than any
13 other inmate whom the officers did not know was entitled to a vegetarian meal).

14 Plaintiff makes no allegation with respect to what class of prisoners he belongs and
15 how the treatment he received was dissimilar to that received by other inmates. Plaintiff
16 shall be afforded one opportunity to file an amended complaint to attempt to allege
17 sufficient facts to state a cognizable denial of access to the courts claim.

18 **6. Eighth Amendment**

19 At the end of the complaint, Plaintiff claims that Defendants' acts and omissions
20 subjected him to cruel and unusual punishment under the Eighth Amendment. (Compl. at
21 10.) The only punishment mentioned in the complaint is the loss of privileges which he
22 received for the guilty finding on the RVR. *See supra* at 5. There is no law that supports
23 the claim that the loss of *privileges* amounts to cruel and unusual punishment.
24 Accordingly, this Eighth Amendment claim is DENIED with prejudice for failure to state a
25 claim for relief.

26 In the same paragraph in which he alleges that his Eighth Amendment right was
27 violated, Plaintiff also claims that Defendants acted "in concert in a conspiracy and injured

1 the plaintiff while engaged in protected conduct.” (*Id.*) First of all, Defendants’ actions
2 with respect to Plaintiff’s “protected conduct” is only relevant to his First Amendment
3 retaliation claim, as discussed above, and has no bearing on the Eighth Amendment. *See*
4 *supra* at 4-5. Furthermore, conspiracy is not itself a constitutional tort under 42 U.S.C. §
5 1983. *Lacey v. Maricopa County*, 693 F.3d 896, 935 (9th Cir. 2012) (en banc). It does not
6 enlarge the nature of the claims asserted by the plaintiff, as there must always be an
7 underlying constitutional violation. *Id.* The Court has found that Plaintiff has failed to
8 state sufficient facts to allege any cognizable claim. Accordingly, he cannot proceed with
9 a conspiracy claim in this action where there is no underlying constitutional violation.
10 Plaintiff may attempt to raise a related conspiracy claim in his amended complaint only if
11 he is able to state sufficient facts to support an underlying constitutional violation.

12
13 **CONCLUSION**

14 For the foregoing reasons, the Court orders as follows:

15 The complaint is **DISMISSED with leave to amend**. Within **twenty-eight**
16 **(28) days** of the date this order is filed, Plaintiff shall file an amended complaint to state
17 sufficient facts to state a deliberate indifference claim as described above. The amended
18 complaint must include the caption and civil case number used in this order, Case No. C
19 18-06378 BLF (PR), and the words “AMENDED COMPLAINT” on the first page. If
20 using the court form complaint, Plaintiff must answer all the questions on the form in order
21 for the action to proceed.

22 The amended complaint supersedes the original, the latter being treated thereafter as
23 non-existent. *Ramirez v. Cty. Of San Bernardino*, 806 F.3d 1002, 1008 (9th Cir. 2015).
24 Consequently, claims not included in an amended complaint are no longer claims and
25 defendants not named in an amended complaint are no longer defendants. *See Ferdik v.*
26 *Bonzelet*, 963 F.2d 1258, 1262 (9th Cir.1992).

27 **Failure to respond in accordance with this order in the time provided will**

1 **result in the dismissal of this action without prejudice and without further notice to**
2 **Plaintiff.**

3 The Clerk shall include two copies of the court's complaint with a copy of this
4 order to Plaintiff.

5 **IT IS SO ORDERED.**

6 **Dated:** April 1, 2019


BETH LABSON FREEMAN
United States District Judge